Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

ROBERT E. PINE
Petitioner
vs.
THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS AT HOUSTON

PETITION FOR WRIT OF CERTIORARI

GEORGE W, LANG II
ATTORNEY AT LAW
7330 Woodoak
Houston, Texas 77040
(713) 937-0650

Attorney for Petitioner

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless search of Petitioner's premises, and warrantless seizure of an allegedly cruelly-treated colt by a Brazoria County, Texas, Sheriff's Deputy, and subsequent admission of evidence pertaining to said colt, overruling Petitioner's Motion to Suppress, constituted a violation of Petitioner's protection against unreasonable searches and seizures as set forth in the Fourth Amendment to the United States Constitution, or was the search for and seizure of said colt justified by the so-called "exigent circumstances" exception to the general requirement of a warrant.

2. Whether the seizure of Petitioner's animals (including the colt referred to in No. 1, above) and commencement of civil forfeiture proceedings, followed by misdemeanor criminal prosecution of Petitioner, by the State of Texas, all for the same alleged conduct pertaining to cruelty to animals, violated Petitioner's right to protection against being "subject for the same offense to be twice put in jeopardy of life or limb", as set forth in the Fifth Amendment to the United States Constitution.

LIST OF ALL PARTIES AND COUNSEL TO THE PROCEEDINGS

Robert Edward Pine 3900 County Road 48 Rosharon, Texas 77583	Petitioner
George W. Lang II Attorney at Law Texas State Bar No. 11895690 7330 Woodoak Houston, Texas 77040	Counsel for Petitioner at trial and on appeal
THE STATE OF TEXAS: represented by	Respondent
Brazoria County District Attorney's Office Mary Peter Cudd, Assistant District Attorney Ron Helson, Assistant District Attorney Pat Sabesta, Assistant District Attorney 111 E. Locust Angleton, Texas 77515	

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS AT HOUSTON

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner, Robert E. Pine ("Petitioner"), requests that Writ of Certiorari issue to review the judgment of the Texas Fourteenth Court of Appeals at Houston, which affirmed Petitioner's conviction of cruelty to animals, in violation of TX. PENAL CODE Section 42.11, by the County Court of Law No. 3 and Probate Court of Brazoria County, Texas. Petitioner's petition for discretionary review of the Court of Appeals' judgment was refused by the Texas Court of Criminal Appeals on April 12, 1995. (App. E).

OPINIONS BELOW

The opinion of the Texas Fourteenth Court of Appeals at Houston is attached hereto, as Appendix A. (App. A), and is also reported at 889 SW2d 625.

STATEMENT OF JURISDICTION

The opinion of the Texas Fourteenth Court of Appeals at Houston was entered on December 1, 1994. (App. A and 889 SW2d 625). Petitioner's Motion for Rehearing was filed on December 15, 1994, and was denied by the Court of Appeals on December 22, 1994. (App. B and C, respectively). Petition for Discretionary Review with the Texas Court of Criminal Appeals was filed on January 23, 1995.

(App. D); said Court refused the petition on April 12, 1995. (App. E). The Texas Fourteenth Court of Appeals at Houston, pursuant to Texas Rules of Appellate Procedure, Rule 86(c), has stayed its mandate pending disposition of this Petition for Writ of Certiorari. (App. F). This Court, thus, has jurisdiction of this case pursuant to 28 U.S. Code, Section 1257 (a) and Rule 13.1, Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES IN THIS CASE

CONSTITUTION OF THE UNITED STATES

AMENDMENT 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

True and correct photocopies of TX. PENAL CODE, Sec. 42.09, (formerly Sec. 42.11), and TX. HEALTH & SAFETY CODE, Secs. 821. 021, et Seq., are Appendices G and H (App. G, App. H), respectfully.

STATEMENT OF THE CASE

(For reference, the following abbreviations shall be used herein: SF (Statement of Facts, verbatim record of in-court hearings and trial); T (Transcript, record of written documents filed with the trial court in this case).

Petitioner, Robert E. Pine (hereinafter "Petitioner"), is a 70-year old widower, residing on and operating a trailer park on real property at 3900 County Road 48, in Brazoria County, Texas. (SF 267). Prior to January 28, 1993, a number of horses and cattle were maintained on the property for petitioner's own pleasure. (SF 269-270). From approximately January 21, 1993, until January 28, 1993, Petitioner was out of the country, vacationing with friends in Mexico. (SF 270-271).

On January 28, 1993, late in the afternoon, Deputy Kevin Brumfield of the Brazoria County, Texas, Sheriff's Department, was on patrol in his vehicle, when he received a call from the dispatcher regarding a possible "cruelty to animals" complaint at 3900 County Road 48. (SF 40, 41, 100). The complaint was based upon an anonymous call received by the Sheriff's Department. (SF 40, 139). Deputy Brumfield then proceeded to 3900 County Road 48, and, proceeded to enter the property, which was posted NO TRESPASSING, on to its main drive. After proceeding some distance on this road, Deputy Brumfield observed four men sitting on and around a front-end loader. (SF 41, 102). Brumfield introduced himself, and told the men he was there about a "cruelty to animals" complaint. (SF 102, 103). He was made aware that Petitioner, Mr. Pine, was in charge of the premises, but was out of town. He did not ascertain whether any of these four men, in fact, had the authority to admit him to the premises; he assumed that the individual with whom he spoke, later identified as Wayne Reid, was in charge. (SF 41, 107, 139, 140, 147, 220, 221). Brumfield then followed Reid further back on the property, to an area that was inaccessible by car (SF 214-215), some 800-900 yards from the main entrance and not visible therefrom (SF 63), where they observed a colt that was down on the ground. (SF 63).

After his observation of the colt, Deputy Brumfield then walked back to his police vehicle, and contacted his supervisor, an Assistant

District Attorney, and the Stevens & Pruett Humane Ranch, a local not-for-profit animal shelter. (SF 50, 120). The purpose of the call to the Humane Ranch was to get a veterinarian, which Brumfield acknowledged was his own idea. (SF 120). He spoke by phone with a number of individuals at the Humane Ranch, before being advised that they could obtain the services of a veterinarian, as they had one on call, and that they would make him available to Deputy Brumfield. (SF 122, 157). Brumfield then departed 3900 County Road 48, and drove to the Humane Ranch, less than two miles away. There, after speaking with Jim Pruett, local radio personality and one of the proprietors of the Ranch, waited 30-45 minutes for the arrival of the veterinarian, a Dr. Michael Brady, D.V.M. (SF 122, 157). Brumfield, Brady and Jim Pruett then returned to 3900 County Road 48. **Brumfield had been gone from the alleged "crime scene" for 1 and 1/2 to 1 and 3/4 hours** (SF 51, 126), and the entire incident, from the time of his first arrival, until the colt was later removed, took from **2 - 3 Hours.** (SF 59).

Upon Brumfield's return to the property, the colt had now been moved to a barn in another part of the property, closer to the front, by placing the animal on some plywood, and dragging it with the front-end loader. (SF 125, 252). At that location, the colt was being treated by one of the trailer park tenants, who had veterinary medical training, and was being treated with vitamins, dextrose, antibiotics, grain, hay and water. (SF 160, 163, 249-252, 253). Dr. Brady then examined the colt, and opined that the condition of the animal was such that it needed to be removed to the Stevens and Pruett Humane Ranch. (SF 129, 164). Under Brumfield's direction, Brady, Pruett and some of the by-standers then proceeded to load the colt onto a trailer, and remove it from 3900 County Road 48 to the Humane Ranch. (SF 130, 131, 164, 242). Brumfield accompanied the animal to the Humane Ranch. (SF 132).

Petitioner returned to his property sometime during the evening of January 28. It is unclear whether he returned during the removal activities or shortly thereafter. When he became aware of what had transpired, he demanded of Deputy Brumfield the authority by which he entered his property and confiscated the colt. When Brumfield was unable to produce a warrant or any other judicial authority, Petitioner ordered Brumfield off his property and locked the barn door to attempt to stop any further unauthorized removal of his animals. The following day, Petitioner took two workmen and a horse

trailer to the Humane Ranch to retrieve his colt, but the Humane Ranch had no roads to their barn, and the mud was so deep that Petitioner was unable to get to the barn to pick up the colt. (SF 272-274, 309)

The Justice of the peace office, where Brumfield would have applied for a search and/or seizure warrant, was a mere **ten minute** drive away. (SF 61, 140). Brumfield admitted that he could easily have called for a back-up officer, to secure the premises while he went to apply for a warrant, but did not do so. (SF 149-150). Brumfield did not testify that he possessed any veterinary medical training or that his presence was required in order to treat the colt. He testified that, and the Court of Appeals so found, that by the time he and his group decided to move the animal, it was after regular business hours at the justice of the peace, and that it was difficult to contact the justice of the peace after regular business hours. Brumfield admitted that he went, the next day, believed to be a Saturday, but definitely **not during regular business hours**, and was able to obtain from that same judge, a warrant for Petitioner's arrest, and the judge's signature on a "Motion to Seize Animals", which purported to give permission to seize the colt and the remainder Petitioner's animals. (SF 150). On January 30, 1993, Brumfield, along with an army of volunteers, primarily from the Humane Ranch, returned to 3900 County Road 48, seized the rest of Petitioner's animals, and arrested Petitioner on a charge of cruelty to animals. (SF 64).

Petitioner filed a Motion to Suppress, alleging, among other things, an unreasonable search and seizure, without warrant, in violation of Petitioner's rights under the Fourth Amendment to the United States constitution. (T 5-9). After a hearing at which both Petitioner and Brumfield testified, the Motion was denied by the trial court. (SF 68).

After trial by jury, in which the State, over Petitioner's objection, introduced evidence of the condition of the colt, Petitioner was found guilty of cruelty to animals, and sentenced to probated jail time; 10 days in jail as a condition of probation, to be served on weekends; a $3,000 fine, court costs and 200 hours of community service. (SF 365-366).

As the treatment of Petitioner at the hands of the State and

Brazoria County prosecutors would not be accurately portrayed without same, pertinent parts of the chronological history of the legal proceedings brought against Petitioner are set forth herein, with citations to the record:

—January 28, 1993—colt seized without a warrant by Deputy Kevin Brumfield (SF 19, 58, 130);

—January 29, 1993—Deputy Brumfield has "Motion to Seize Animals" signed by the justice of the peace;

—January 30, 1993—Deputy Brumfield seizes other animals and arrests Petitioner (SF 20);

—February 8, 1993—hearing held before justice of the peace on civil forfeiture of animals seized from Petitioner, including colt; court awards animals to Stevens & Pruett Humane Ranch (T 33, 39, 41-44, 53-54, 58; SF 22-26);

—February, 1993—Appeal taken by Petitioner from justice court decision (T 88-91);

—April, 1993—State files information charging Petitioner with 42.11 Penal Code "cruelty to animals" with regard to **all** the animals seized (T 3);

—August, 1993—Petitioner's Motion to Suppress filed (T 5);

—September, 1993—State's Amended Information filed, charging Petitioner with cruelty to animals **as only to colt** (T 13);

—October, 1993—Appellant files objections to State's Motion to remove physical evidence from Cause No. 19,369-B, for use in the criminal proceeding, and motion to continue criminal case pending final determination in civil case; denied (T 17-22; Supplemental Transcript);

—November, 1993—Motion to Suppress heard by the Court; denied (SF 3-68).

REASONS FOR GRANTING THE WRIT

I

The Texas Court of Appeals erred in affirming the trial court's ruling denying Petitioner's Motion to Suppress and admitting into evidence testimony regarding the colt which was searched for and seized without a warrant, in violation of the Fourth Amendment to the United States Constitution, on the basis of "exigent circumstances."

Deputy Kevin Brumfield of the Brazoria County Sheriff's Department was dispatched, on January 28, 1993, in the late afternoon, to 3900 County Road 48 in Brazoria County, Texas, on an anonymous call of alleged cruelty to animals. Brumfield entered the property, upon which Petitioner resided and upon which he operated a trailer park, which was posted NO TRESPASSING, and drove some distance onto the property. He then encountered four men sitting on and around a front-end loader. He inquired about the animal cruelty complaint, and one of the men, later identified as Wayne Reid, told the Deputy that Petitioner, the person in charge of the property, was out of town. Brumfield **assumed** that Reid was in charge; there was no discussion of Reid's actual authority. Brumfield then followed Reid further back onto the property. There, Deputy Brumfield observed a colt down on the ground. Brumfield then returned to his patrol car, where he radioed his supervisor, the district attorney, and then contacted the Stevens & Pruett Humane Ranch, located within one and one-half miles of 3900 County Road 48, hereinafter, referred to as the "Humane Ranch." The Humane Ranch was operated by two local radio personalities and served, inter alia, as an animal shelter. Upon contacting the Humane Ranch, Brumfield was told that they had a veterinarian on call, and that they were going to summon him. The Deputy then departed the premises at 3900 County Road 48 and drove to the Humane Ranch. There, he made contact with one of the proprietors, who informed him that the veterinarian was on the way. Brumfield waited 30 to 45 minutes at the Humane Ranch, before the veterinarian, Dr. Michael Brady, DVM, arrived. Brumfield, Brady and Jim Pruett, one of the proprietors of the Humane Ranch, then returned to 3900 County Road 48, again without a warrant. Brumfield had been gone from 1 and 1/2 to 1 and 3/4 hours. By this time, the colt had been moved a considerable distance from the field to a barn, where the

animal was being treated by one of the trailer park tenants, who was a certified veterinary assistant with veterinary training. The justice's office was a ten-minute drive away.

Upon arrival, Dr. Brady undertook an examination of the colt, determined that its condition was poor, and that it required treatment which it was already getting in the form of vitamins, B-12, antibiotics and dextrose, as well as grain, hay and water. Brady suggested that the colt should be taken to the Humane Ranch. With Deputy Brumfield in charge, Brady, Pruett and some of the bystanders at the scene then loaded the colt onto a trailer, and Brumfield, Pruett and Brady then took the colt to the Humane Ranch.

Petitioner returned to his property sometime during the evening of January 28. It is unclear whether he returned during the removal activities or shortly thereafter. When he became aware of what had transpired, he demanded of Deputy Brumfield the authority by which he had entered his property and confiscated the colt. When Brumfield was unable to produce a warrant or any other judicial authority, Petitioner ordered Brumfield off his property and locked the barn door to attempt to stop further unauthorized removal of his animals. The following day, Petitioner took two workmen and a horse trailer to the Humane Ranch to retrieve his colt, but the Humane Ranch had no roads to their barn and the mud was so deep Petitioner could not get to the barn to pick up his colt.

Brumfield acknowledged that he could have called another officer to assist him at the scene, to secure the "crime" scene while he went to obtain the warrant. Brumfield further acknowledged that he went the next day, a Saturday, not regular business hours, and was able to get other judicial authorization signed by that same justice of the peace, on this same case. Brumfield stated, further, that he did not conduct any investigation as to the available food, care or shelter that would have been available to the colt and the other animals on the property.

Warrants are generally constitutionally required to search a person's home unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. **Mincey v. Arizona,** 437 U.S. 385, 393-394, 98 S.Ct. 2408, 2414 (1978); **Torres v. Commonwealth of Puerto Rico,** 442 U.S. 465, 471 99 S. Ct. 2425,

2430 (1979); **New York v. Quarels,** 467 U.S. 649, 104 S. Ct. 2626, 2630 n.3 (1984). The burden is on those seeking exemption from the warrant requirement to demonstrate the need for the exemption. **Arkansas v. Sanders,** 442 U.S.753,759, 99 S.Ct. 2586, 2591 (1979). JUSTICE STEWART, in the **Mincey** opinion, articulated what he considered to be objectively reasonable bases for such noncompliance with the general requirement of a warrant: the officer must reasonably believe that a **person** is in need of **immediate** aid, or to see if there are other victims or if the killer is still on the premises. 437 U.S. at 392, 98 S. Ct. at 2414, or when there is an indication that evidence was about to be removed. 437 U.S. at 394, 98 S. Ct. at 2414. As stated by JUSTICE WHITE in **Minnesota v. Dickerson,** __ U.S. __, 113 S.Ct. 2130, 2135 (1993):

> "Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are **per se** unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

See, also, **California v. Acevado,** __U.S.__, 111 S. Ct. 1982, 1991 (1991). As noted in **Arkansas v. Sanders,** supra, 442 U.S. at 759-761, 99 S.Ct. at 2590-2591, the exceptions to the requirement of a warrant are "jealously and carefully drawn."

Exigencies—Needs of Law Enforcement

The exigencies of law enforcement, in order to justify warrantless search or seizure, must be **compelling. New York v. Quarels,** supra, 467 U.S. at 653, 104 S.Ct. at 2630 n. 3. In this case, there was no indication that evidence was about to be removed from the scene of a criminal investigation; Petitioner was absent on vacation, and all other persons with whom Deputy Brumfield came into contact seemed eager to assist the Sheriff's Department, and the colt was getting all the treatment at Petitioner's ranch that it could have gotten anywhere. The reason articulated by the Texas Court of Appeals, to wit, that it was past regular business hours at the office of the justice of the peace, the judge probably wouldn't be there, and "(t)here is no evidence that if Deputy Brumfield had attempted to contact a justice of the peace, one would have been immediately available to issue a seizure warrant", 889 SW2d at 632, is not and

never has been recognized as an "exigency" or an "emergency" justifying a warrantless search or seizure. First, this statement ignores the obvious and well-established legal requirement of probable cause that must be shown by the officer seeking the warrant; there is no guaranty that the judge would have found such probable cause. Second, the Courts have found, time and time again, that the standard for this exemption to the warrant requirement is based not upon "inconvenience", but rather, "impossibility", of obtaining a warrant. **U.S. v. Hernandez-Salazar,** 813 F.2d 1126, 1131 (11th Cir. 1987); **U.S. v. Johnson,** 834 F.2d 1191, 1196 (5th Cir. 1987). Courts have specifically struck down the inability to conveniently get hold of a judge or prosecutor as a valid reason for a warrantless search or seizure. **U.S. v. Ogbuh,** 982 F.2d 1000, 1003-1004 (6th Cir. 1993) (that warrant would take an unusual amount of time because AUSA was not immediately available.); **U.S. v. Morgan,** 743 F.2d 1158, 1161 (6th Cir. 1984) cert.den. 471 U.S. 1061 (1985) ("Well, generally, we have tried to, on several occasions, to contact the judges on the weekend and either one of the judges are hard to reach on the weekend.") The generalized urgency of law enforcement is not an exigent circumstance. **Torres v. Commonwealth of Puerto Rico,** supra, 442 U.S. at 474, 99 S. Ct. at 2431.

Brumfield was gone for 1 and 1/2 hours from the scene of the "criminal investigation" (see, statement of facts, pp. 132-136, to see how little criminal "investigation" was actually done); no backup was called to be present and secure the scene while he was gone. This would certainly not be consistent with a law enforcement "exigency", and would certainly not be a valid explanation for the failure to drive the ten minutes necessary to the justice's office to apply for a warrant. The Texas Court of Appeals cites no authority, under Federal or state cases, to support its holding regarding the inability of the Deputy to quickly get hold of a judge as a basis for skipping the warrant altogether; Petitioner has cited ample authority to show that this is not a legally or constitutionally valid excuse for the failure to obtain a warrant. It is always **inconvenient** for an officer to obtain a warrant prior to a search or seizure; it is certainly not always **impossible.** Under the standard articulated by the Fourteenth Court of Appeals in this case, just about any inconvenience will suffice.

Exigencies—Medical Emergency

The facts of this case do not support the conclusion of the Court of Appeals that the alleged "medical emergency" regarding the colt, even if considered a "life-saving emergency", see, infra, was such as to make it **impossible** for Deputy Bruinfield to drive the ten minutes necessary to obtain the warrant to seize the colt. No reason is given for Deputy Brumfield's required presence at the scene, in order to preserve or protect the life of this animal, that would have made it **impossible** for Deputy Brumfield to drive ten minutes to the justice of the peace office; he had previously departed for 1 and 1/2 hours, and while gone, treatment was begun on the animal, without the Deputy's assistance or at his order. The Court of Appeals simply ignored the requirement of "impossibility".

Permitting law enforcement officers simply to enter a citizen's property and seize a sick animal, without any type of judicial authorization, is not a "reasonable" seizure. It is reasonable that a neutral magistrate should, in such instances, examine the facts to see if, indeed, there is probable cause that the crime of animal cruelty has been committed. Animals get sick and animals die on private property by the tens of thousands all of the time; it is not necessarily animal cruelty under the criminal law. As noted, infra, the Texas Animal Cruelty statute, Section 42.11, TX.PENAL CODE, requires acts or omissions **on the part of the owner** in order that a violation be shown, not just the showing of an animal in poor physical condition.

Acknowledging that it had no precedent, the Court of Appeals also ruled that saving the life of an animal was a "medical emergency", an exception to the warrant requirement. (App. A, p. 10; 889 SW2d at 631). The "medical emergency" exception to the warrant requirement occurs when a **person** is found in an unconscious or semi-conscious condition and the purpose of the search is to discover evidence of identification and other appropriate medical assistance. The rationale is that the need to protect **life** or avoid serious injury to **another** is paramount to the right of privacy and is thus justified for what would otherwise be an invalid search in the absence of an emergency. Annotation, "Lawfulness of Search of Person or Personal Effects Made Under Medical Emergency Exception to Warrant requirement." 11 **A.L.R. 5th** 52, 61 (1993); **Mincey v. Arizona,** supra, 437 U.S. at 392 (To protect or preserve a **life** is justification for what would otherwise be an invalid search.)

Generally, domestic animals do not rise to the level of human beings. 3A, **C.J.S.,** Animals, Sec. 4; **Thiele v. City and County of Denver,** 312 P.2d 786, 789 (Colo. 1957). Animals possess no legal or constitutional rights of their own. **Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium,** 836 F.Supp. 45, 49-50 (D. Mass. 1993); **Massachusetts Society for Prevention of Cruelty to Animals v. Commissioner of Public Health,** 339 Mass. 216, 158 N.E.2d 487, 495 (1959); 3A **C.J.S.,** Animals, Sec. 99. If saving a "life" is expanded to include "life" other than "human life", the medical emergency exception is greatly expanded, and is no longer "carefully drawn or carefully delineated". **Arkansas v. Sanders,** supra, 442 U.S. at 759; **U.S. v. Anderson,** 981 F.2d 1560, 1567 (10th cir. 1992). "Life" is defined, inter alia, as" (t)hat state in which animals and plants exist which distinguishes them from inorganic substances and from dead organisms: characterized by metabolism and growth, reproduction, and internally initiated adaptations to the environment." Britannica World Language Dictionary, 1964. "Life" could include, therefore, plants, animals and even invisible organisms. There is no legal basis in any of the cited cases for extending "life" to anything other than human life. There is nothing in the language of the Fourth, or any other Amendment to the United States Constitution that would recognize the rights of animals as being paramount to those of human beings. The Texas Court of Appeals' decision elevates the rescue of an animal to a legal status superior to that of a citizen's right to privacy.

As the search and seizure in this case, undertaken without a warrant, was clearly unreasonable, in violation of the Fourth amendment, made applicable to the states by the Fourteenth Amendment, **Minnesota v. Dickerson,** supra, __U.S. __, 113 S.Ct. at 2135, Petitioner's Motion to Suppress should have been granted, and all evidence with regard to the colt should have been excluded from evidence at this trial.

II.

The prosecution and punishment by the State of Texas of Petitioner under Sec. 42.11 (now, 42.09), TX. PENAL CODE, after seizure of and resulting forfeiture of Petitioner's animals in a forfeiture proceeding under Secs. 821.021, et seq., TX. HEALTH & SAFETY CODE, violated Petitioner's protection under Amendment 5 to the United States Constitution:". . .nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb," made applicable to the states by the Fourteenth Amendment.

A.

The issue of Double Jeopardy, based upon multiple punishments of Petitioner for the same offense, was decided by the Texas Fourteenth Court of Appeals in a manner sufficient for this Honorable Court to have jurisdiction thereof.

The opinion of the Texas Fourteenth Court of Appeals (App. A, at page 2; 889 SW2d at 627) states that the issue of Double Jeopardy was not raised until Petitioner's (Appellant's) Reply brief was filed with that Court (Appellant's Reply Brief, pp. 13-17), and, therefore, in the exercise of its "discretion", refuses to consider said point of error. However, the Court of Appeals, in a footnote, went on to hold that even if the Double Jeopardy claim was properly raised, Petitioner's prosecution and punishment under TX.PENAL CODE Sec. 42.11 did not constitute Federal Double Jeopardy. (App. A, p.2; 889 SW2d at 627, n.2). Further, the Court of Appeals referred to the other proceeding, by style and case number, noting that it was before the County Court at Law No. 3 of Brazoria County, Texas, the same trial court in which this Cause was heard. (App. A, p.8, n. 4; 889 SW2d at 830, n.4).

The Double Jeopardy argument raised in Petitioner's Reply Brief before the Court of Appeals, relied upon the opinion handed down by the same Texas Fourteenth Court of Appeals, **Fant v. State,** 881 SW2d 830 (Tex. App. Hous.14th 1994, p.d.r. granted), in which the Court of Appeals held that a civil seizure pursuant to Chapter 59, TX.CODE CRIM. PRO., followed by a criminal prosecution for possession of a controlled substance, violated Fant's constitutional protection against Double jeopardy. 881 SW2d at 834.

The Federal Constitutional issue is not properly before the Supreme Court if the State court rejected the constitutionality claim on state procedural grounds. **Ulster County Court v. Allen,** 442 U.S. 140, 148, 99 S.Ct. 2213, 2220 (1979); **Hammerstein v. Superior Court of California,** 340 U.S. 622, 623, 71 S.Ct. 521 (1951). However, where it is clear that the merits of the constitutional claim were reached, and that the state court actually consid-

ered and decided the Constitutional claim, the issue is properly before the Supreme Court. **Aetna Life Insurance Company v. Lavoie,** 475 U.S. 813, 819, 106 S.Ct. 1580, 1584 (1986); **Ulster County Court v. Allen,** supra, 442 U.S. at 153, 99 S.Ct. at 2222; **Cohen v. Coweles Media Co.,** 501 U.S. 663, 667, 111 S.Ct. 2513, 2517 (1991). In **International Longshoreman's Association, AFL-CIO v. Davis,** 476 U.S. 380, 386, 106 S.Ct. 1904, 1910 (1986), this Court stated:

> "The Alabama Supreme Court, although holding that the ILA's pre-emption claim had been waived, stated **in a footnote** that if it had occasion to reach the merits, it would have found no pre-emption." (Emphasis added).

This is exactly what the Texas Fourteenth Court of Appeals did in its opinion. (App. A, pp. 2,8; 889 SW2d at 627,630). By the above-noted citations and references, the Court of Appeals indicated that: 1) it was aware of and had before it the civil forfeiture proceeding being brought concurrently by the State against petitioner; 2) the Court would not stay one proceeding while the other was being litigated; and 3) notwithstanding its exercise of "judicial discretion", would have ruled against Petitioner in any case. In order for the Court of Appeals to perform its analysis, albeit brief, contained in the aforementioned footnotes, it, of necessity, would have had to have reviewed the **Fant** decision, supra, and the Constitutional questions decided therein, and applied them to the proceedings in this case.

Petitioner submits that the Court of Appeals did reach the merits of Petitioner's claim pertaining to Double Jeopardy, and that his claim is properly before this Court.

B

The criminal prosecution and punishment of Petitioner under Sec. 42.11, TX.PENAL CODE, after the State had already initiated, by the seizure of the colt and other animals, a civil forfeiture on the grounds of alleged cruelty to animals under Secs. 821.021, et seq., TX.HEALTH & SAFETY CODE, violated the Fifth Amendment to the United States Constitution, as putting Petitioner twice in jeopardy for the same offense.

Sec. 42.11, TX.PENAL CODE (effective Sept. 1, 1994, Sec.

42.09, TX.PENAL CODE), reads, in pertinent part, as follows:

> "(a) A person commits an offense if he intentionally or knowingly:
>
> * * *
>
> "(2) fails unreasonably to provide necessary food, care or shelter for an animal in his custody."
>
> * * *

Secs. 821.021, et seq., TX. HEALTH & SAFETY CODE, provide in pertinent part as follows:

> "(Sec. 821.021) In this subchapter, 'cruelly treated' includes tortured, seriously overworked, unreasonably abandoned, **unreasonably deprived of necessary food, care or shelter,** cruelly confined or caused to fight with another animal. (Emphasis added).
>
> "(Sec. 821.022[a]) If a county sheriff, constable, or deputy constable or an officer who has responsibility for animal control in a municipality has reason to believe that an animal has been or is being **cruelly treated,** he may apply... for a warrant to seize the animal. (Emphasis added).
>
> "(Sec. 821.022[b]) On a showing of probable cause to believe that the animal has been or is being **cruelly treated,** the court shall issue the warrant and set a time within 10 days of the issuance for a hearing in the court to determine whether the animal has been **cruelly treated.** (Emphasis added).
>
> "(Sec. 821.022[c]) The officer executing the warrant shall give written notice to the owner of the animal of the time and place of the hearing.
>
> "(Sec. 821.023[a]) **A finding in county court that the owner of an animal is guilty of an offense under Section 42.11 Penal Code, involving the animal is prima facie evidence at a hearing authorized by Section**

821.022 that the animal has been cruelly treated. (Emphasis added).

"(Sec. 821,023[d]) Except as provided by Subsection (e), if the court finds that the animal's owner has **cruelly treated** the animal, the court shall:

* * *

"(2) order the animal given to a nonprofit animal shelter, pound or society for the protection of animals. (Emphasis added).

"(Sec. 821,023[g]) The court shall order the animal returned to the owner if the court **does not find that the animal's owner has cruelly-treated the animal."** (Emphasis added).

This Court has often held that the Double Jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. **U.S. v. Halper,** 490 U.S. 435, 440, 109 S.Ct. 1892, 1987 (1989). There has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. **Ex Parte Lange,** 85 U.S. 163, 168 (1873). This Court has also previously held, in an Eighth Amendment case, that a civil in rem forfeiture of property may constitute a "punishment". **Austin v. U.S.,** __ U.S. __, 113 S.Ct. 2801 (1993). Both **Halper** (in a Fifth Amendment case) and **Austin** (in an Eighth Amendment case) hold that the notion of punishment cuts across the division between the civil and the criminal law. Compare, **Halper,** supra, 490 U.S. at 448, 109 S.Ct. at 1901, with **Austin,** supra, __U.S. at __, 113 S.Ct. at 2805.

"To that end, the determination of whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment."

U.S. v. Halper, supra, 490 U.S. at 448, 109 S.Ct. at 1901-1902. This constitutional protection is intrinsically personal and only the character of the actual sanctions can substantiate a possible Double Jeopardy violation. **Department of Revenue of Montana v. Kurth Ranch,** __U.S.__, 114 S.Ct. 1937, 1946 (1994).

JUSTICE O'CONNOR's analysis of the history of civil forfeiture in **Austin,** supra, __U.S. at __, 113 S.Ct. at 2806-2810, indicates in rem forfeiture as being "punitive" in nature, despite legal fictions such as "the thing itself is primarily the offender", etc. The **Austin** opinion also notes the presence of an "innocent owner" defense in the statute in question, __U.S. at __, 113 S.Ct. at 2810, and notes that such provision "serve to focus the provisions on the culpability of the owner that makes them look more like punishment, not less." __U.S. at __, 113 S.Ct. at 2810-2811. It has further been held that a civil sanction that cannot fairly be said to serve **only** a remedial purpose, but rather can only be explained as **also** serving either retributive or deterrent purposes, is punishment. **Austin,** supra, __U.S. at__, 113 S.Ct. at 2812; **Halper** supra, 490 U.S. at 448, 109 S.Ct. at 1902. It has also been held to be immaterial whether the civil penalty precedes or follows the criminal proceeding. **U.S. v. Sanchez-Escarino,** 950 F.2d 193, 200 (5th Cir. 1991) cert.den. __U.S.__, 113 S.Ct. 123 (1991); **U.S. v. Mayer,** 897 F.2d 1126, 1127 (11th Cir. 1990) cert.den. __U.S.__, 111 S.Ct. 178 (1990).

As set out in the procedural history, set forth, supra, Petitioner's colt was seized by the Deputy Sheriff on January 28, 1993, and the remainder of the animals, some 16 others, were seized on January 30, 1993. On February 8, 1993, a hearing was held before the Brazoria County justice of the peace, which resulted in an order that all of Petitioner's animals, including the colt, be "donated" to the Stevens & Pruett Humane Ranch. That ruling was appealed pursuant to State law, and only after this appeal was filed, did the State decide to commence its criminal prosecution of Petitioner in this case. As set forth, this prosecution resulted in a sentence of probation, weekend jail time, a monetary fine and required community service time, in addition to the loss of animals through the forfeiture, including the colt.

The civil forfeiture of animals, provided under Secs. 821.021, et seq., TX.HEALTH & SAFETY CODE, is based solely upon a find-

ing of the culpability of the owner thereof: if the justice of the peace finds that the animals were "cruelly treated" (note: same definition of "cruelly treated" as the penal code provision), the justice has the option of either selling the animals, or donating the animals to a non-profit animal shelter. Significantly, if the justice finds that the animals are not "cruelly treated", they are returned to the owner. ("Innocent owner defense", which JUSTICE O'CONNOR has held makes it look more like a punishment.) There is no question in this case of recoupment of the costs of law enforcement or any similar argument. See, **Halper,** supra, 490 U.S. at 452, 109 S.Ct. at 1903; **Kurth Ranch,** supra, __U.S. at __, 114 S.Ct. at 1945. The State will undoubtedly argue that the statute providing for civil forfeiture for cruelly-treated animals also serves a remedial purpose, i.e., the removal of cruelly-treated animals from an abusive owner and unhealthy environment, and placing them in an allegedly more hospitable surroundings. Even, for argument's sake, conceding some remedial purpose, the forfeiture is still obviously punitive and tied to the culpability of the owner, and, the punishment provided is the confiscation of the animals from their owner. As previously noted herein, all that is required by the decisions of this Court for a civil forfeiture to constitute "punishment" for Constitutional purposes is that it have **some** punitive purpose, even if it has other "remedial" purposes.

In addition, Sec. 821.023(a), TX.HEALTH & SAFETY CODE, provides that if there is a conviction under TX.PENAL CODE Sec. 42.11, the State acquires a presumption of "cruel treatment" in a subsequent civil forfeiture proceeding. The tying together of the criminal and civil proceedings is further indication of "multiple punishments" for the same offense. Compare, **Kurth Ranch,** supra, __U.S. at__, 114 S.Ct. at 1497:

> "In this case, the tax assessment not only hinges on the commission of a crime, it is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the obligation in the first place."

In this type of case, the article seized is not, per se, unlawful or looked upon with suspicion or disfavor, such as illegal drugs, gambling paraphernalia, alcoholic beverages, etc. There is no question of the retention of illegally acquired gains, such as income taxes lawfully due but not paid, such as discussed in **Helvering v. Mitchell,**

303 U.S. 391, 58 S.Ct. 630 (1938), wherein the penalty and forfeiture provisions which were available in addition to criminal prosecution for tax evasion, were referred to as "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." 303 U.S. at 401, 58 S.Ct. at 634. There are also no questions of damages or reparations in addition to criminal penalties, nor is there a question of two different sovereignties (U.S. and state governments) prosecuting a defendant. See, **Moore v. Illinois,** 55 U.S. 13, 19-20 (1852).

This situation is, Petitioner submits, more than a mere "technicality"; it is a real, unfair and unconstitutional deprivation of Petitioner's rights as an American citizen. To interpret the United States Constitution as permitting a government to initiate multiple prosecutions, concurrently, against a citizen for the same conduct, resulting in multiple punishments (loss of animals, monetary fine, jail time, etc) causes a result tolerated neither by the language of the constitutional Amendment itself, nor by the aforecited case law. The State of Texas, in this case, as noted in the summary of procedural history set forth, supra, removed evidence from the civil forfeiture, and used it in the criminal proceeding; the same persons testified in both proceedings, and the State was able to move back and forth between the two proceedings to suit its own purposes. (See, e.g., SF 137, 138, 146, 171, 172, 194, 241, 260). The State of Texas is certainly entitled to enforce its laws against animal cruelty, and would certainly not be prevented from doing so, if this Court should hold that it cannot do so multiple times for the same conduct.

WHEREFORE, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GEORGE W. LANG II
Attorney at Law
7330 Woodoak
Houston, Texas 77040
(713) 937-0650

Attorney for Petitioner

Supreme Court, U.S.
FILED
95 201 JUL 10 1995

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

ROBERT E. PINE
Petitioner
vs.
THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS AT HOUSTON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GEORGE W, LANG II
ATTORNEY AT LAW
7330 Woodoak
Houston, Texas 77040
(713) 937-0650

Attorney for Petitioner

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APPENDIX "A"

Affirmed and Opinion filed December 1, 1994

In The

Fourteenth Court of Appeals

NO. B-14-94-00233-CR

ROBERT EDWARD PINE, Appellant

v.

THE STATE OF TEXAS, Appellee

OPINION

Appellant entered a plea of not guilty before a jury to the offense of Cruelty to Animals. TEX. PENAL CODE ANN. §42.11(a)(2) (Vernon 1989).[1] The jury found him guilty, and the trial court assessed punishment at a $3,000 fine and 180 days in jail, probated for two years. Appellant appeals his conviction, bringing a total of nine points of error. We affirm.

In his original brief, Appellant brings seven points of error; his reply to the State's brief contains two additional points, including

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1-Renumbered and amended by Acts1993, 73rd Leg., ch. 900, §1.01, amendment effective Sept. 1, 1994 (current version at TEX.PENAL CODE ANN. §42.09(a)(2)(Vernon 1994)).

a double jeopardy claim based on Fant v. State, 881 SW2d 830 (Tex.App.--Houston [14th Dist.] 1994, pet.granted). A plea of double jeopardy may be raised for the first time on appeal. Jones v. State, 586 SW2d 542, 544 (Tex.Crim.App. 1979); Diaz v. State, 762 SW2d 701, 703 (Tex.App.--Houston [14th Dist.] 1988), pet.ref'd 796 SW2d 183 (Tex.Crim.App. 1990). However, Appellant failed to include this point in his original brief, and a claim of double jeopardy, like any other constitutionally protected right, may be waived. Id.

Under Texas Rule of Appellate Procedure 74, all points of error sought to be reviewed are to be included in the original brief. Rochelle v. State, 791 SW2d 121, 124 (Tex.Crim.App. 1990); see also Allen v. State, 795 SW2d 15, 16 (Tex.App.--Houston [14th Dist.] 1990, no pet.). Supplemental briefs may be filed and considered only with leave of the appellate court, and the decision whether to consider new points raised

in a supplemental brief is left to the sound discretion of the reviewing court. Rochelle, 791 SW2d at 124. Although this Court allowed Appellant to file his reply brief, we decline to consider the two new matters raised in the brief, including Appellant's double jeopardy claim.[2]

In his original brief, Appellant challenges: (1) the trial court's refusal to grant a continuance; (2) the trial court's denial of a motion to suppress; (3) the sufficiency of the evidence; (4) the court's charge to the jury; (5) the admission of extraneous offenses; and (6) the trial court's assessing punishment instead of the jury. We will address the sufficiency points first.

SUFFICIENCY OF THE EVIDENCE

In his third point of error, Appellant claims the trial court erred in denying his Motion for Instructed Verdict, and Motion for

2- Even were we to address Appellant's point, his argument fails. Fant specifically addressed double jeopardy in the context of the Texas drug forfeiture statute, a statute not at issue in the case before us.

New Trial, because the evidence is insufficient to support the jury's verdict. In his fourth point of error, Appellant claims the trial court erred in denying his Motion for New Trial because the jury's verdict was "contrary to the overwhelming weight and preponderance of the evidence."

We review a challenge to the trial court's ruling on a motion for instructed verdict as a challenge to the sufficiency of the evidence. Madden v. State, 799 SW2d 683, 686 (Tex.Crim.App. 1990), cert.denied 499 U.S. 954 (1991). The well-established standard for reviewing the sufficiency of the evidence is that an appellate court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Garrett v. State, 851 SW2d 853, 857 (Tex.Crim.App. 1993). In conducting this review, the appellate

court is not to re-evaluate the weight and credibility of the evidence, but is only to ensure that the trier of fact reached a rational decision. Muniz v. State, 851 SW2d 238, 246 (Tex.Crim.App.), cert.denied ____U.S.____, 114 S.Ct. 116, 126 L.Ed2d 82 (1993). The same standard applies in both direct and circumstantial evidence cases. Ransom v. State, 789 SW2d 572, 577 (Tex.Crim.App. 1989), cert. denied 497 U.S. 1010 (1990).

Appellant's fourth point of error claims the verdict was "against the great weight and preponderance of the evidence." This Court has consistently applied this "factual sufficiency" review only to cases in which the defendant has the burden of proof on his affirmative defense or another fact issue. See Smith v. State, 874 SW2d 269 (Tex.App.--Houston [14th Dist.]1994, pet.ref'd), and cases cited therein (all citing Meraz v. State, 785 SW2d 146, 154 (Tex.Cr.App. 1990)). Here, Appellant challenges the sufficiency of the evidence to support the jury finding that he intentionally

or knowingly committed the charged offense. Because the defendant's mental culpability is an element of the crime on which the State has the burden of proof, the correct standard of review to be applied is the Jackson standard, as stated above. Smith, 874 SW2d at 272. Therefore, applying the Jackson standard to both of Appellant's sufficiency points, we examine the facts presented at trial in the light most favorable to the jury's verdict.

Appellant is the manager of a trailer park, located on approximately forty acres of his property. On January 28, 1993, Sheriff's Deputy Kevin Brumfield was dispatched to Appellant's property to investigate an anonymous complaint of cruelty to animals. When Deputy Brumfield entered the property, he first observed several horses, which appeared to be in "good shape." He also saw four men standing on the road, informed them of the reason for his visit, and asked them if there were any other animals on the property.

One of the men, later identified as Appellant's employee Wayne Reid, told Brumfield that the animals he was referring to were located on the "back forty," and that the deputy could follow him, as he was on his way there. After following Reid to another part of the property, Deputy Brumfield saw several animals standing in a pasture, all of which appeared unhealthy, with bones and ribs showing. Farther along in the pasture, Brumfield and Reid came upon the colt that is the subject of the current case.

The colt was wet and muddy and could not stand. It had no energy, and its ribs were visible through the skin. Later witnesses described the colt as "in very, very poor condition," and "emaciated." Deputy Brumfield examined the colt's teeth, and could find no food particles or residue, an indication that the colt had not been eating. Although fresh food was laid out by the colt's head, the pasture in which it was laying was wet and muddy and the grass was very short

and unsuitable for grazing. In addition, there was a smell of raw sewage from an open trench full of liquid, around which the deputy saw hoofprints. Upon seeing the condition of the colt, Deputy Brumfield asked about the possibility of obtaining a veterinarian, but he was informed that Appellant, the colt's owner, was out of town and no one else had authority to call a vet. Brumfield took it upon himself to find a vet to tend to the colt, as he believed that in its weakened condition the colt could not survive the night.

Deputy Brumfield contacted the neighboring Stevens & Pruett Humane Ranch ("the Ranch"), a non-profit organization which takes in abused, abandoned, and neglected animals. James Pruett called Dr. Mike Brady, a volunteer veterinarian for the Ranch. Dr. Brady examined the colt, and determined that it was at least 200 pounds underweight as a result of malnutrition and parasites. Dr. Brady recommended transferring the colt to a loca-

tion where it could be provided the intensive therapy necessary to save its life. Dr. Brady, James Pruett, and Deputy Brumfield assisted in moving the colt from Appellant's property to the Ranch, where it was treated for about 10 days. Ultimately, the Ranch personnel took the colt to the veterinary school at Texas A&M University, where it received extensive treatment and eventually recovered. Two days after the colt was taken from Appellant's property, Deputy Brumfield returned and arrested Appellant for cruelty to animals.

The Texas Penal Code provides that one commits the offense of cruelty to animals if he "intentionally or knowingly. . .fails unreasonably to provide necessary food, care or shelter for an animal in his custody." TEX. PENAL CODE ANN. §42.11(a)(2). Appellant claims the evidence adduced at trial is insufficient to prove that he "intentionally or knowingly" violated the statute.

A person acts with intent with respect

to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. Dues v. State, 634 SW2d 304, 305 (Tex.Crim.App. 1982); TEX. PENAL CODE ANN. §6.03(a). A person acts with knowledge when he is aware of the nature of his conduct, or that the circumstances surrounding his conduct exist. Humason v. State, 728 SW2d 363, 365 (Tex.Crim.App. 1987); Whitworth v. State, 808 SW2d 566, 568-69 (Tex.App.--Austin 1991, pet.ref'd); TEX. PENAL CODE ANN. §6.03(b). A person may act unintentionally and still commit a criminal act, provided he acts with knowledge. Dockery v. State, 542 SW2d 644, 649 (Tex.Crim.App. 1976)(opinion on reh'g); Vollbaum v. State, 833 SW2d 652, 656 (Tex.App. --Waco 1992, pet.ref'd).

Whether an accused acted with intent or knowledge is a question to be determined by the trier of fact. Hemphill v. State, 505 SW2d 560, 562 (Tex.Crim.App. 1974); Parramore v. State, 853 SW2d 741, 745 (Tex.App.--Corpus Christi 1993, pet.ref'd). Knowledge and intent

may be inferred from the conduct of, remarks by, and circumstances surrounding the acts engaged in by the defendant. Turner v. State, 600 SW2d 927, 929 (Tex.Crim. App. [Panel Op.] 1980); Jones v. State, 687 SW2d 430, 432 (Tex.App.--Houston [14th Dist.] 1985, no pet.)

Appellant cites two cases for the rule that when a statute requires the criminal act be committed knowingly, "should have known" is not sufficient for conviction. See Axelrod v. State, 764 SW2d 296 (Tex.App. --Houston [1st Dist.] 1988), pet.dism'd 789 SW2d 594 (Tex.Crim.App. 1989); and Starr v. State, 734 SW2d 52 (Tex.App.-- Houston [1st Dist.] 1987, no pet.). However, both of the cited cases applied the "actual knowledge" standard to the specific offense of serving alcohol to a minor. We find that when the offense charged is cruelty to animals, knowledge and intent may be inferred from the circumstances surrounding the offense.

In addition to the facts set forth above, the following evidence was adduced at trial to show the circumstances surrounding Appellant's conduct with regard to the colt's care and feeding. Appellant and Wayne Reid, Appellant's employee, testified that another employee named Randy Cole had the responsibility of feeding the animals, and that a stock of food, including oats, rice, and hay, was kept on the property for the animals. In addition, the pasture was planted in ryegrass and clover, and a supply of fresh water was available for the animals from two stock tanks on the property. However, evidence was presented that Appellant was in charge of the premises, and it was ultimately his responsibility to ensure the animals were fed, even though he had delegated the actual feeding to another.

Appellant testified that he usually only saw the animals from a distance, and would inspect them every 2 to 3 weeks. However, several witnesses stated that it was readily obvious

to any observer that the colt was suffering from malnutrition. Additionally, Dr. Brady testified that it would have taken 5 to 6 weeks for the colt to reach its current malnourished condition if it had been receiving a small amount of feed. His opinion was echoed by Peggy Royster, a Ranch volunteer, and by Kathy McCoy, a veterinary technician who tended to the colt before it was transported to the Ranch. In addition, the State produced evidence that besides the colt, several other animals observed by Deputy Brumfield were also suffering from malnutrition. Even if Appellant had not specifically seen the colt during his "inspections", the presence of these other uncared-for animals makes it more probable that not that Appellant knew that all of the animals under his care were not receiving sufficient nutrition.[3]

3- Appellant challenges the admission of the evidence about the other animals as extraneous offenses. However, in reviewing a sufficiency challenge, this Court must examine all the evidence, whether properly or improperly admitted. Bobo v. State, 843 SW2d 572, 575-76 (Tex.Crim.App. 1992); Rodriguez v. State, 819 SW2d 871, 873 (Tex.Crim.App. 1991)

We hold that the above evidence is sufficient for a rational trier of fact to have inferred from the acts of Appellant and the facts and circumstances surrounding the colt's condition that Appellant knowingly or intentionally failed to provide necessary food, care or shelter for the colt. We overrule Appellant's third and fourth points of error.

MOTION FOR CONTINUANCE

In his first point of error, Appellant contends the trial court erred in refusing to grant him a continuance. Appellant filed a motion asking the trial court to continue the criminal case until a final judgment was rendered in the civil forfeiture suit brought by the State.[4] In reviewing the appellate record, we note that the motion for continuance was unsworn. All motions for

4- The State sought civil forfeiture of all of the cruelly treated animals pursuant to TEX.HEALTH & SAFETY CODE ANN. §821.023 (Vernon 1992) in State v. Approximately (15) Horses and (2) Head of Cattle, No. 19,369B (County Court at Law No. 3, Brazoria County, Tex., April 21, 1994)

continuance must be sworn to by a person having personal knowledge of the facts relied on for a continuance. TEX.CODE CRIM. PROC. ANN. art. 29.08. The trial court does not err in refusing to grant a continuance which does not comply with the requirements of Article 29.08. Smith v. State, 676 SW2d 379, 385 (Tex.Crim.App. 1984), cert.denied 471 U.S. 1061 (1985); Hall v. State, 711 SW2d 108, 113 (Tex.App.--Houston [14th Dist.] 1986, pet. ref'd). We overrule Appellant's first point of error.

MOTION TO SUPPRESS

In his second point of error, Appellant contends the trial court erred in overruling his motion to suppress evidence he claims was obtained in violation of state law and the United States and Texas Constitutions.[5] He

5-See U.S. CONST. amend. IV; and TEX.CONST. art. I, §9. Although Appellant claims violations of both the federal and state constitutions, he makes no separate argument pursuant to the Texas Constitution. Therefore, we will review the contention of constitutional violation under the auspices of the United States Constitution,

further argues that the illegally obtained evidence was subsequently used against him at trial in violation of TEX.CODE CRIM.PROC. ANN. art. 38.23 (Vernon Supp. 1994). Specifically, Appellant contends that prior to removing the colt from his property, Deputy Brumfield was required by statute to obtain a warrant to seize the animal. Because the deputy failed to obtain the warrant, Appellant maintains that the removal of the colt constituted an illegal seizure of evidence, and any evidence obtained as a result of the illegal seizure should have been suppressed.

The seizure of the colt was undertaken pursuant to TEX.HEALTH & SAFETY CODE ANN. § 821.022 (Vernon 1992), which provides:

> If a county sheriff, constable or deputy constable or an officer who has responsibility for animal control in a municipality has reason to believe that an animal has been or is being cruelly treated, he may apply to a justice court

---

without analyzing whether the Texas Constitution should be interpreted differently than the federal constitution. See Brimage v. State, No. 70,105, slip op. at 16, n. 11 (Tex.Crim.App. September 21, 1994).

> in the county or to a municipal court in the municipality in which the animal is located for a warrant to seize the animal.

We have been unable to find, and neither party has cited, any cases construing this provision in terms of the constitutional implications of the failure of the deputy to obtain such a warrant prior to the seizure of a cruelly treated animal. However, in the context of criminal investigations, there is a wealth of case law discussing the failure of law enforcement personnel to obtain a search warrant. A "search warrant" may be issued to search for and seize property or items constituting evidence of an offense, or evidence tending to show that a particular person committed an offense. TEX. CODE CRIM. PROC. ANN. art. 18.02(10) (Vernon Supp. 1994) (emphasis added). Therefore, in analyzing Appellant's constitutional arguments, we analogize to evidentiary seizures effected in the absence of a search warrant.

The State argues that the seizure of

the colt was proper under the "emergency doctrine." The emergency doctrine is an exception to the constitutional prohibition of searches and seizures carried out without a warrant from a magistrate. Bray v. State, 597 SW2d 763, 764 (Tex.Crim.App. 1980). The Fourth Amendment does not prohibit a warrantless search and seizure when there is a need to act immediately to protect or preserve life, or to prevent serious injury. Id.; see also Mincey v. Arizona, 437 U.S. 385, 392 (1978). In order to justify the warrantless seizure under the emergency doctrine, the State must show (1) that the deputy had probable cause to believe the animal was being cruelly treated, and (2) that obtaining a warrant was impracticable because the deputy reasonably believed there was an immediate need to act to preserve a life. See Brimage v. State, No. 70,105, slip op. at 25 (Tex.Crim.App. September 21, 1994); Crane v. State, 786 SW2d 338, 346 (Tex.Crim.App. 1990). In assessing an officer's belief that

a warrantless intrusion is justified by an exigent circumstance, we apply an objective standard of reasonableness, judging the circumstances as they exist at the time the decision was made to go forward without a warrant. Brimage, slip op. at 25; Janicek v. State, 634 SW2d 687, 691 (Tex.Crim.App. 1982); Stewart v. State, 681 SW2d 774, 778 (Tex.App. Houston [14th Dist.] 1984, pet.ref'd). The burden of proof is on the State to justify a warrantless intrusion. Brimage, slip op. at 25; Bray, 597 SW2d at 765.

In this case, Deputy Brumfield entered the property to investigate an allegation of cruelty to animals. When he observed the colt and its condition, he had the requisite probable cause at that time to find that an animal was being cruelly treated. See Crane, 786 SW2d at 338. The contested issue is whether the deputy reasonably believed there was an immediate need to act to preserve a life, such that it would have been impracticable to obtain a warrant.

Deputy Brumfield testified that when he saw the colt, it was in extremely poor condition, and that he immediately attempted to obtain a veterinarian to begin treatment. He admitted that it would have taken only ten to twenty minutes to drive to a nearby town and request a seizure warrant from the justice of the peace. Instead, thinking the colt would not survive the coming night without help, the deputy went in seach of a veterinarian. Deputy Brumfield testified that he waited for Dr. Brady for an hour to an hour and a half before returning with him to Appellant's property. Appellant argues that this waiting period proves that the circumstances were not so exigent that the deputy could not have made the short drive to obtain a warrant. We disagree. Although Deputy Brumfield stated that he had experience with horses, and could recognize when a horse was severely malnourished, his level of experience clearly did not rise to that of an expert on the medical treatment

of horses. Thus. although the deputy gave his lay opinion that the colt could not survive the night without treatment, plainly that determination could not be made with any certainty until the colt was examined by a veterinarian.

The evidence shows that Dr. Brady arrived to treat the colt as night was falling. At that time the decision was made by Dr. Brady that the colt had to be moved to the Ranch to save its life. Deputy Brumfield did not know that he would be required to obtain a seizure warrant until Dr. Brady made the determination that the colt would have to be removed from the property. Therefore, the fact that Deputy Brumfield waited for Dr. Brady and could have used that time to obtain the seizure warrant is of no consequence. It is from the moment that Dr. Brady made the decision to remove the colt that we examine the reasonableness of Deputy Brumfield's belief that obtaining a warrant would be impracticable.

The evidence shows that it was fully dark when Dr. Brady made the decision to transport the colt to the Ranch. He said the colt would not survive the night. Although the justice of the peace's office was only ten to twenty minutes away, by the time Dr. Brady made the determination that the colt needed to be moved in order to save its life, it was after the time the office would normally be closed. There is no evidence that if Deputy Brumfield had attempted to contact a justice of the peace, one would have been immediately available to issue a seizure warrant. On the other hand, there is ample evidence in the record that the colt needed emergency care which could not be provided on the property, and that it was in danger of dying before a warrant could be obtained. Thus, we find that Deputy Brumfield's belief that an emergency justified seizing the colt without a warrant is objectively reasonable.

The Court is aware that exceptions to

the warrant requirement must be "specifically established and well-delineated." Mincey, 437 U.S. at 390 (quoting Katz v. United States, 389 U.S. 347, 357 (1967). We have been unable to find a precedent for applying the emergency doctrine to an emergency involving saving the life of an animal. However, the "concrete factual situation" presented to us by this case compels us to find that Deputy brumfield was presented with an emergency situation which made the warrantless seizure reasonable. See Fearance v. State, 771 SW2d 486, 509 (Tex.Crim.App. 1988), cert.denied, 492 U.S. 927 (1989); see also Janicek, 634 SW2d at 691.

Because the need to preserve the life of the colt justified Deputy Brumfield's warrantless seizure of the animal, we hold that the Fourth Amendment was not violated. Having found no violation of constitutional proportions, we further hold that Appellant was not entitled to the protections of the Article 38.23 exclusionary rule. Thus, the trial

court committed no error in refusing to grant Appellant's motion to suppress. We overrule Appellant's second point of error.

JURY INSTRUCTIONS

In his fifth point of error, Appellant claims the trial court erred by instructing the jury that it was required to find beyond a reasonable doubt, that Appellant "intentionally or knowingly" unreasonably deprived the colt of "food, care, or shelter," when the information charged that Appellant "intentionally and knowingly" failed to provide "food, care and shelter" (emphasis added). We find no error. Although the State may allege different methods for committing the offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. Kitchens v. State, 823 SW2d 256, 258 (Tex. Crim.App. 1991) cert.denied, ____U.S.____, 112 S.Ct. 2309. 119 L.Ed.2d 230 (1992). We overrule Appellant's fifth point of error.

EXTRANEOUS OFFENSES

In his sixth point of error, Appellant

contends the trial court erred in permitting the State to introduce evidence concerning the condition of other animals located on the property where the colt was found. The State argues that Appellant waived his right to complain on appeal by not making the proper objection every time the evidence was introduced, and that such evidence is admissible as background contextual evidence. We address the waiver argument first.

During the case in chief, the State first attempted to bring in evidence of a malnourished cow seen by Deputy Brumfield on the "back forty" before he saw the colt. Appellant objected that the evidence was extraneous and highly prejudicial. See Montgomery v. State, 810 SW2d 372, 386-390 (Tex. Crim.App. 1990) (op. on reh'g)(delineating the proper objections to extraneous evidence). When the trial court overruled his objection, counsel requested and received a running objection to "all this testimony." In addi-

tion, when the prosector asked Deputy Brumfield about the other apparently malnourished animals he saw, Appellant again objected and again received a running objection. Thereafter, the State introduced evidence that the other animals on the property had visible ribs, were extremely malnourished, and were taken from the property and placed at the Ranch. Later in the trial, when the State played a videotape for the jury of the colt and the other animals, the following exchange occurred:

> [Defense counsel]: I believe I also, Your Honor, have a running objection to testimony of other animals.
>
> THE COURT: That's correct. You do.

Generally, an objection must be made every time inadmissible evidence is offered, at the peril of waiving the objection. Johnson v. State, 803 SW2d 272, 291 (Tex.Crim. App. 1990) cert.denied 501 U.S. 1259 (1991); Juhasz v. State, 827 SW2d 397, 399 (Tex.App.--Corpus Christi 1992, pet.ref'd). However, the

so-called "running objection" has a deeply rooted place in the jurisprudence of Texas, and is permitted by the Texas Rules of Appellate Procedure. See TEX.R. APP. P 52(b); see also White v. State, 784 SW2d 453, 455 (Tex.App.--Tyler 1989, pet.ref'd). The legitimate function of a running objection is to do away with redundant and disruptive individual objections, and promote the orderly progression of trial. Sattiewhite v. State, 786 SW2d 271, 284 n. 4 (Tex.Crim.App. 1989) cert. denied 498 U.S. 881 (1990). Because the trial court expressly affirmed that it granted a running objection to the extraneous offense evidence, we find that error was properly preserved for appellate review. See Grunsfeld v. State, 813 SW2d 158, 165 n. 3 (Tex.App. --Dallas 1991), affirmed 843 SW2d 521 (Tex. Crim.App. 1992)(holding a running objection preserved error when the trial court stated expressly that no further objection need be made).

Evidence showing other bad acts that a

defendant may have committed is usually excluded because an accused should be tried only for the crime alleged and not for being a criminal generally. Abdnor v. State, 871 SW2d 726, 738 (Tex.Crim.App. 1994); Lockhart v. State, 847 SW2d 568, 570 (Tex.Crim.App. 1992) cert.denied, ____U.S.____, 114 S.Ct. 146, 126 L.Ed.2d 108 (1993); TEX.R. CRIM. EVID. 404(b). However, extraneous offenses may be admitted for other purposes, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Lockhart, 847 SW2d at 571 (quoting Rule 404(b)'s listed exceptions). Evidence is admissible if it serves to make an elemental fact more or less probable. Montgomery, 810 SW2d at 386.

In this case, Appellant contested his knowledge that the colt was suffering from malnutrition. Deputy Brumfield testified that there were several animals on the "back forty" that also exhibited symptoms of starvation and malnutrition. If it were only the colt that

had signs of malnutrition, it could be argued that the colt had a specific ailment other than malnutrition. The fact that several other animals on the property also exhibited a lack of food, care or shelter makes it more likely that the condition of the colt was due to lack of food, care or shelter. Given that Appellant inspected the animals every two or three weeks, the evidence of the other animals' condition makes it more probable that Appellant knew about the colt's condition. Even if the colt was not visible on these occasions, the appearance of the other animals should have alerted Appellant that all of the animals, including the colt, were not receiving the proper food and care. We hold that the evidence of the condition of the other animals was relevant to show the elemental fact of Appellant's knowledge of the colt's condition. Appellant's sixth point of error is overruled.

PUNISHMENT ASSESSMENT

In his seventh point of error, Appell-

ant's contends the trial court erred in assessing punishment because Appellant filed a motion in which he requested that the jury assess punishment. The Texas Code of Criminal Procedure provides:

> [I]f a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that(1) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial began, and(2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury. . .[emphasis added].

TEX. CODE CRIM. PROC. ANN. art. 37.07§2(b) (Vernon Supp. 1994). Where the defendant files no election, the trial court has the duty to assess punishment. Toney v. State, 586 SW2d 856, 858 (Tex.Crim.App. 1979); Gibson v. State, 549 SW2d 741, 742 (Tex.Crim. App. 1977).

On the day of trial, Appellant filed a document entitled "Defendant's Statement in

Support of Jury Probation." The document informs this Court of [Appellant's] intention to make a motion for probation in the event he is found guilty." Appellant claims this document constitutes a motion requesting that the jury assess punishment and recommend probation. We disagree. Clearly, the document only expresses Appellant's conditional intent to request probation in the future. Other than the title's inclusion of the words "Jury Probation", there is nothing in this document to alert the trial court that Appellant is making an election under Art. 37.07 to have the jury assess punishment. Because Appellant did not properly evoke his statutory right to have the jury assess punishment, it was the judge's responsibility to assess the punishment. Gibson, 549 SW2d at 742; Tuebner v. State, 742 SW2d 57, 58 (Tex.App.--Houston [14th Dist.] 1987, pet.ref'd) cert.granted 486 U.S. 1043 (1989). We overrule Appellant's seventh point of error.

Having overruled all of Appellant's points of error, we hold that the judgment of the trial court is AFFIRMED.

/s/ Ross A. Sears

Justice

Judgment rendered and Opinion filed
December 1, 1994.
Panel consists of Justices Sears, Draughn and Barron.
Publish-TEX. R. APP. P. 90

JUDGMENT

The Fourteenth Court of Appeals

ROBERT EDWARD PINE, APPELLANT

NO. B14-94-00233-CR V.

THE STATE OF TEXAS, APPELLEE

This cause came on to be heard on the transcript of the record of the court below. The same being considered, it is the opinion of this Court that there was no error in the judgment. It is ordered by the Court that the judgment be in all things **AFFIRMED**, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

APPENDIX "B"

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

December 15, 1994

RE: Case No. 14-94-00233-CR

Style: Pine, Robert Edward

v: The State of Texas

Please be advised that on this date appellant's motion for hearing was received and filed in the above cause.

T.C. Case # 73,680B

Mary Jane Smart,
Clerk

George W. Lang II
7330 Woodoak
Houston, TX 77040

APPENDIX "C"

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

December 22, 1994

George W. Lang II
7330 Woodoak
Houston, TX 77040

Mary Peter Cudd
Assistant District Attorney
200 E. Locust
Suite 9
Angleton, TX 77515

RE: Court of Appeals Number: 14-94-00233-CR

Trial Court Case Number: 73,680B

Style: Pine, Robert Edward

v.

The State of Texas

Dear Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

MARY JANE SMART, DEPUTY

By /s/ Charlene Mitchell
Chief Deputy

cc: Judge, County Court No. 3
Brazoria County Courthouse
Angleton, TX 77515

Court Reporter
County Court at Law No. 3
Brazoria County Courthouse
Angleton, TX 77515

Dolly Bailey
Brazoria County Courthouse
Angleton, TX 77515

APPENDIX "D"

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

January 23, 1995

RE: Case No. 14-94-00233-CR

Style: Pine, Robert Edward

v: The State of Texas

Appellant's Petition for Discretionary Review was received and filed on this date. Record will be forwarded to the Court of Criminal Appeals within our fifteen (15) day deadline.

T.C. Case # 73,680B

Mary Jane Smart,
Clerk

George W. Lang II
7330 Woodoak
Houston, TX 77040

APPENDIX "E"

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 12, 1995
COA#: 14-94-00233-CR

RE: Case No. 0119-95

STYLE: PINE, ROBERT EDWARD

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. Box 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

MAIL TO: GEORGE W. LANG II
7330 WOODOAK
HOUSTON TX 77040

APPENDIX "F"

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

April 27, 1995

George W. Lang II
7330 Woodoak
Houston, TX 77040

Mary Peter Cudd
Assistant District Attorney
200 E. Locust
Suite 9
Angleton, TX 77515

RE: Court of Appeals Number: 14-94-00233-CR

Trial Court Case Number: 73,680B

Style: Pine, Robert Edward

v.

The State of Texas

Dear Counsel:

Please be advised that on this date the Court GRANTED appellant's motion to stay mandate in the above cause.

MARY JANE SMART, CLERK

By /s/ Charlene Mitchell
Cheif Deputy

cc: Judge, County Court No. 3
Brazoria County Courthouse
Angleton, TX 77515

Court Reporter
County Court at Law No. 3
Brazoria County Courthouse
Angleton, TX 77515

Dolly Bailey
Brazoria County Courthouse
Angleton, TX 77515

APPENDIX "G"

Vernon's TEX.PENAL CODE ANN.

§ 42.09. Cruelty to Animals

(a) A person commits an offense if he intentionally or knowingly:

(1) tortures or seriously overworks an animal;

(2) fails unreasonably to provide necessary food, care, or shelter for an animal in his custody;

(3) abandons unreasonably an animal in his custody;

(4) transports or confines an animal in a cruel manner;

(5) kills, injures, or administers poison to an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;

(6) causes one animal to fight with another; or

(7) uses a live animal as a lure in dog race training or in dog coursing on a racetrack.

(b) It is a defense to prosecution under this section that the actor was engaged in bona fide experimentation for scientific research.

(c) For purposes of this section, "animal" means a domesticated and wild living creature previously captured. "Animal" does not include an uncaptured wild creature or a wild creature whose capture was accomplished by condcut at issue under this section.

(d) An offense under this section is a Class A misdemeanor.

(e) It is a defense to prosecution under Subsection (a)(5) that the animal was discovered on the person's property in the act of or immediately after injuring or killing the person's goats, sheep, cattle, horses, swine, or

poultry and that the person killed or injured the animal at the time of this discovery.

APPENDIX "H"

Vernon's TEX.HEALTH & SAFETY CODE ANN.

SUBCHAPTER B.

DISPOSITION OF CRUELLY TREATED ANIMALS

§821.021 Definition

In this subchapter, "cruelly treated" includes tortured, seriously overworked, unreasonably abandoned, unreasonably deprived of necessary food, care, or shelter, cruelly confined, or caused to fight with another animal.

§821.022 Seizure of Cruelly Treated Animal

(a) If a county sheriff,constable, or deputy constable or an officer who has responsibility for animal control in a municipality has reason to believe that an animal has been or is being cruelly treated, he may apply to a justice court in the county or to a municipal court in the municipality in which the animal is located for a warrant to seize the animal.

(b) On a showing of probable cause to believe that the animal has been or is being cruelly treated, the court shall issue the warrant and set a time within 10 days of the date of issuance for a hearing in the court to determine whether the animal has been cruelly treated.

(c) The officer executing the warrant shall cause the animal to be impounded and shall give written notice to the owner of the animal of the time and place of the hearing.

§821.023 Hearing; Order of Sale or Return of Animal

(a) A finding in county court that the owner of an animal is guilty of an offense under Section 42.11, Penal Code, involving the animal is prima facie evidence at a hearing authorized by Section 821.022 that the

animal has been cruelly treated.

(b) A statement of an owner made at a hearing provided for under this subchapter is not admissible in a trial of the owner for an offense under Section 42.11, Penal Code.

(c) Each interested party is entitled to an opportunity to present evidence at the hearing.

(d) Except as provided by Subsection (e), if the court finds that the animal's owner has cruelly treated the animal, the court shall:

(1) order a public sale of the animal by auction;

(2) order the animal given to a nonprofit animal shelter, pound, or society for the protection of animals; or

(3) order the animal humanely de-

stroyed if the court decides that the best interests of the animal or that the public health and safety would be served by doing so.

(e) If the court finds that the animal's owner has cruelly treated the animal and that the animal is farm livestock, the owner shall be divested of ownership and the court shall order a public sale of the animal by auction, order the animal given to a nonprofit animal shelter, pound, or society for the protection of animals, or order the animal humanely destroyed if the court decides that the best interests of the animal or that the public health and safety would be served by doing so. In this subsection, "farm livestock" means cattle, hogs,

sheep, goats, mules, jacks, jennets, or poultry raised or used on a farm or ranch for food or for the production of legal income.

(f) The court may order that an animal disposed of under Subsection (d)(1) or (d)(2) be spayed or neutered at the cost of the receiving party.

(g) The court shall order the animal returned to the owner if the court does not find that the animal's owner has cruelly treated the animal.

§821.024 Sale or Disposition of Cruelly Treated Animal

(a) Notice of an auction ordered under this subchapter must be posted on a public bulletin board where other public notices are posted for the county or municipality. At the auction, a bid by the former owner of a cruelly treated animal or the owner's representative may not be accepted.

(b) Proceeds from the sale of the animal shall be applied first to the expenses incurred in caring for the animal during impoundment and in conducting the auction. The officer conducting the auction shall pay any excess proceeds to the justice or municipality court ordering the auction. The court shall return the excess proceeds to the former owner of the animal.

(c) If the officer is unable to sell the animal at auction, he may cause the animal to be destroyed or may give the animal to a nonprofit animal shelter, pound, or society for the protection of animals.

§821.025 Appeal

(a) An owner of an animal ordered sold at public auction as provided in this subchapter may appeal the order.

(b) While an appeal under this section is pending, the animal may not be sold, destroyed, or given away as provide by Sections 821.022-821.024.